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IN THE

Supreme Court of the United States

October Term, 1953

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No. 277

GENERAL ARTISTS CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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GENERAL ARTISTS CORPORATION,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, General Artists Corporation, respectfully prays a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on June 18th, 1953.

Opinions Below.

The opinions of the Tax Court (R. 77-83) are reported in 17 T. C. 1517. The opinion of the Court of Appeals (R. 111-114) is not yet officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 18th, 1953 (R. 115). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Question Presented.

The question presented here is whether the moneys received by the Petitioner from MCA Artists Ltd., pursuant to the terms of a contract dated December 10, 1943, for the sale, assignment and transfer of three exclusive agency contracts, constituted ordinary income under Section 22(a) of the Internal Revenue Code, or capital gain under Section 117 of the Code.

Statutes Involved.

Internal Revenue Code:

Sec. 22. Gross Income.

(a) General Definition.—"Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal services (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or

profit, or gains or profits and income derived from any source whatever. • • •

• • • • •

(26 U. S. C. 1946 ed., Sec. 22.)

Sec. 117. CAPITAL GAINS AND LOSSES.

(a) (As amended by Sec. 150 (a) (1), Revenue Act of 1942, c. 619, 56 Stat. 798) Definitions.—As used in this chapter——

• • • • •

(4) Long-term capital gain.—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

• • • • •

(10) (As added by Sec. 150(b), Revenue Act of 1942, supra) Net Capital gain.—

(A) Corporations.—In the case of a corporation, the term "net capital gain" means the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges; • • •

• • • • •

(c) (As amended by Sec. 150 (c), Revenue Act of 1942, supra) Alternative Taxes.—

(1) Corporations.—If for any taxable year the net long-term capital gain of any corporation exceeds the net short-term capital loss, there shall be levied, collected, and paid, in lieu of the tax

imposed by sections 13, 14, 15, 204, 207 (a) (1) or (3), and 500, a tax determined as follows, if and only if such tax is less than the tax imposed by such sections:

A partial tax shall first be computed upon the net income reduced by the amount of such excess, at the rates and in the manner as if this subsection had not been enacted, and the total tax shall be the partial tax plus 25 per centum of such excess.

* * * * *

(26 U. S. C. 1946 ed., Section 117.)

Statement.

The controversy involves the determination of the Petitioner's liability for income and excess profit taxes for the fiscal year ended October 31, 1944. It has been held that the amounts received by the Petitioner during the taxable year from MCA Artists Ltd., and reported by the Petitioner as net long term capital gain, represent ordinary income.

The Petitioner is engaged in the business of securing employment or bookings for entertainers in various phases of the entertainment business. It operates under franchises from various guilds or unions connected with the entertainment field, and it was so engaged during the year in question, the fiscal year ended October 31, 1944. The Petitioner entered into an exclusive agency contract with one Frank Sinatra, a singer and entertainer. The Petitioner was, among other things, granted the exclusive right to secure employment for Sinatra in the fields covered by the American Guild of Variety Artists (AGVA)

the American Federation of Radio Artists (AFRA) and the Screen Actors Guild (SAG).

Thereafter, the Petitioner and MCA Artists Ltd., another booking agency, entered into a contract, dated December 10, 1943 providing for the sale of the Sinatra contract and all rights thereunder to MCA. The Petitioner was not in the business of selling contracts such as these, and it had never sold any such contracts prior to December 10, 1943. In fact, this was the only contract sold during the fiscal year under review, or at any time prior thereto.

The contract of sale to MCA Artists Ltd., after providing for the sale thereof, stated that MCA Artists Ltd. agreed to perform all the duties required to be performed by the Petitioner under the contract, and further contained mutual releases of all claims. Sinatra, in writing, agreed to be bound thereby.

The Tax Court held that the amount received constituted ordinary income rather than capital gain. Five Judges dissented. The minority opinion, written by the dissenting Judge before whom the case was tried, was concurred in by the other four dissenting Judges. The majority based its opinion upon the premise that the agency contracts were not assignable property and that they were not actually sold and assigned. The minority disagreed with this premise and held that the contracts were property rights or capital assets and were subject to sale and assignment.

On petition for review filed by the Petitioner, the United States Court of Appeals for the Second Circuit affirmed the decision of the Tax Court. It held that there was not a transfer or sale here, even though a third person was involved. It held, further, that Congress would specifically have dealt with such a situation if it felt that the tax here should be treated as capital gains receipts.

Reasons for Granting the Writ.

There is very substantial conflict between the decision of the Court of Appeals for the Second Circuit, as set forth in the present case, and (a) the Court of Appeals for the Tenth Circuit, and (b) the Court of Appeals for the Third Circuit. The Courts of the Tenth Circuit and Third Circuit are in accord, and their holdings are contrary to the Court in the Second Circuit. Indeed, the Court below in the Second Circuit has said that it disagrees with the decisions in the other Circuits.

In the instant case, the Court of Appeals held that the moneys received from the transfer constituted ordinary income, and reference was made to *Commissioner* v. *Starr Bros. Inc.* (— F. [2d] — May 29, 1953, C. A. 2) which it decided about two weeks before this case. The Court stated:

> "As to amounts which may not have been produced by taxpayer's efforts, our recent decision in *Commissioner* v. *Starr Bros.* — F. (2d) — (May 29, 1953, C. A. 2) is pertinent. There a manufacturer of drugs agreed to terminate a contract under which the taxpayer had the exclusive right to sell manufacturers' products in a certain area. In holding that the amounts received in consideration of the taxpayer's agreement to terminate were ordinary income, we said that decisive issue was 'whether there was a "sale or exchange" of such capital asset when the contract was terminated in 1943.' We held that the release of the negative covenant not to sell to another was not a 'sale' and pointed out: 'When Congress has wished to tax as capital gains receipts which would not fall within the ordinary meaning of "sale or exchange" of assets, it has dealt specifically with such transaction. * * *'"

In the *Starr Bros.* case, upon which the Court relied, it said:

> "In holding that the taxpayer made a sale of its 1903 contract the Tax Court relies particularly upon *Jones* v. *Corbyn*, 10 Cir. 186 F. 2d 450, where cancellation of an exclusive general insurance agency contract was held to be a 'sale' of a capital asset. *With due deference to the majority opinion, we respectfully agree with Judge Phillips' dissent.*" (Italics ours.)

It is clear, therefore, that the Court below in the Second Circuit has refused to follow the decision and opinion of the Tenth Circuit in *Jones* v. *Corbyn*. As a matter of fact, the Court below has specifically stated that it agrees with the dissent in the *Corbyn* case. There is therefore a substantial conflict between the decision of the Court of Appeals for the Second Circuit, in the instant case and the decision of the Court of Appeals for the Tenth Circuit in *Jones* v. *Corbyn*.

In the *Starr Bros.* case, the Court of Appeals referred to the case of *Commissioner of Internal Revenue* v. *Irving Golonsky and Frank Gold*, in the Third Circuit. The Court said:

> "The Third Circuit has also given a very broad construction to 'sale or exchange.' See *Commissioner* v. *Golonsky*, 200 F. 2d 72, involving surrender of a lease to the lessor".

It is to be noted that an application for a writ was made by the Commissioner to the Supreme Court in the *Golonsky* and *Gold* cases, and that the writ was denied by this Court (345 U. S. 939).

It is clear, therefore, that the Court below in the instant case has specifically disagreed also with the holding of the Third Circuit Court of Appeals. The Third Circuit has

held that the accelerated termination of a lease for a cash payment was a sale and that the sum received by the lessee was taxable as a capital gain.

It is clear, too, that the Court below in the Second Circuit has disagreed with what it claims to be "a very broad construction to sale or exchange". The Second Circuit is in direct conflict with the Third Circuit in its interpretation of Section 117 of the Internal Revenue Code.

Circuit Judge Pickett's decision in *Jones* v. *Corbyn*, has been a fundamental one in the interpretation of Section 117, and has been followed by the Tax Court and the Circuit Courts. That decision has now been cast aside by the Court of Appeals in the Second Circuit.

In the *Jones* v. *Corbyn* case, there was a partnership which was, by contract, the exclusive agency of an insurance company in a designated territory. In 1944 the agency and the insurance company contracted to terminate the agency contract. The partnership was to resign as agents, discontinue selling or soliciting insurance on behalf of the company, and to turn over its office space, books and records and all files dealing with the company's business. The agency received $45,000.00 upon the execution of the termination contract. In preparing the tax return of each partner, the respective portions of the $45,000.00. received by the partnership were reported as proceeds from the sale of capital assets subject to the capital gains tax as set forth in the statute under Code Section 117. The Commissioner sought to tax the proceeds as ordinary income rather than as proceeds from the sale of property.

Circuit Judge Pickett, speaking for the Court, said:

> "We do not agree with this contention. The contract or franchise had at all times substantial value. It was capable of producing income for its owner.

It was enforceable at law and could be bought and sold. Acting under its provisions, the agents developed a large and lucrative business."

The Court further stated:

"The statutory definition of capital assets includes all property not excluded. Merten's Laws of Federal Income Taxation, Vol. 3, Sec. 22.04."

In *Commissioner of Internal Revenue* v. *Isadore Golonsky and Frank Gold* (affirmed by the Third Circuit and writ denied by this Court) the opinion of Judge Murdock sets forth the pertinent facts and interpretation of the law:

"The Commissioner concedes that if the petitioners had sold their lease to a third party, there would have been a capital gain. Also, a capital gain results from a transaction like the present one if a sublease remains in effect. *Walter H. Sutliff*, 46 B. T. A. 446. The Commissioner contends, nevertheless, that the transaction between the petitioners and the owner of the property was a cancellation of the lease rather than a sale because "the lease contract, as in the case of notes, option, and other contracts, can not be sold to the lessor (obligor) for the reason that an attempted sale to the lessor results in a termination of the lease agreement, which in turn, extinguishes the right of possession."

"The petitioners, as lessees, had a right under the lease to possession and use of the property for the months of July, August and September in 1944, a property right. The new owner in the transaction paid the petitioners $7,500. to acquire the right to the use and possession of the property for those three months, a right which theretofore it had never had. Cf. *Henry B. Miller*, 10 B. T. A. 383; *Charles*

B. Bretzfelder, 21 B. T. A. 789; *Harriet B. Borland,* 27 B. T. A. 538; *Walter H. Sutliff, supra.* That is a sufficient transfer of property to bring the transaction within section 117.

The use of the word 'cancellation' is not determinative where something is transferred. Cf. *Jones* v. *Corbyn,* 186 F. 2d 450. The case is unlike *Hale* v. *Halvering,* 85 F. 2d 819, involving the satisfaction of a debt in which no property was received by the debtor. *United Cigar-Whelan Stores Corporation* v. *District of Columbia,* 176 F. 2nd 952, holds to the contrary but without stating a convincing reason. The surrender of an option is likewise different because nothing is transferred. *Seth M. Milliken,* 15 T. C. 243. The case of *Hort* v. *Commissioner,* 313 U. S. 28, is distinguishable on its facts. *Walter H. Sutliff, supra.* There the lessee paid Hort, the landlord, to cancel the lease, and the Court held that the payment was basically 'merely a substitute for the rent reserved in the lease' expressly taxable under Section 22(a). Here, the amount was paid by the landlord to the tenant and the Commissioner does not argue that it resembled rent in any way or is expressly mentioned as income in section 22(a)."

The opinion of Circuit Judge Goodrich in the *Golonsky* and *Gold* cases is also apposite. He said:

"To call the transaction a cancellation or termination of a lease and not a sale is, we think, to assume the point to be decided. Undoubtedly, there is a cancellation of the lease when the tenants voluntarily surrendered the premises to the landlord in accordance with an agreement, but the fact that the cancellation occurs does not negative the fact that

> the transaction may constitute a sale. A lease is certainly property although it admittedly is not an estate of freehold as that term was used in the Common Law pertaining to real estate. This property was transferred by the then owner to another for a stipulated price which was paid. That would seem to constitute a sale unless there is some limiting requirement that nothing can be sold except a tangible chattel, which is not the case."

In the instant case, there is even a more compelling reason for holding that there is a sale as is contemplated by Section 117 of the Internal Revenue Act. There was a transfer by Petitioner to a third party. And the Commissioner has conceded that the sale of a lease to a third party constitutes capital gain. *Commissioner* v. *Golonsky and Gold,* 16 T. C. 1450. The situation here did not involve the payment of any consideration for an agreement to refrain from competing. Petitioner continued to do business as a booking agency for other clients after the effective date of the sale of the exclusive agency contract sold to MCA. This sale was a single, isolated transaction. Petitioner sold its exclusive agency contracts to MCA. It did not merely relinquish rights thereunder.

In the *Starr Bros.* case, the Court said, in essence, that a transaction such as is involved here should have been the subject matter of a specific legislative enactment in order to qualify as a capital gains transaction. We do not believe there is such a requirement. We submit there is no ambiguity about the nature of the present transaction. The courts have construed such a transaction as the sale of a capital asset. There was no reason for Congress to deal with it specifically. The converse, in fact, may well be argued. The Courts have treated a transaction of this sort as the sale of a capital asset, and Congress has not legislated to the contrary. This is indicative of the

acquiescence of Congress in such an interpretation of Section 117.

The question involved here is a recurrent one, and a most important one. The Court of Appeals for the Second Circuit has disagreed and is in conflict with decisions which are being followed by the Tax Court and the Court of Appeals in other circuits. For example, in the case of *Louis W. Ray* v. *Commissioner,* 18 T. C. 438, the Tax Court held, in conformity with the *Golonsky* and *Gold* cases, that money received by lessees from a lessor by the striking of a clause from the lease was derived from a sale within the intent of Section 117 of the Internal Revenue Act. This case is now on appeal to the Fifth Circuit, in New Orleans, and we are advised that the case will be reached for argument some time in January, 1954.

Conclusion.

There is a fundamental conflict and disagreement here among the Circuits, upon a most important question of law. This conflict involves the interpretation of Section 117 of the Internal Revenue Act. It also involves principles of public importance with respect to the correct imposition and collection of federal taxes. The conflict will grow unless there is a determination and settlement by this Court of the conflict, for the information and guidance of the citizens of the United States. We submit the petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON MILLER,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 277

GENERAL ARTISTS CORPORATION (FORMERLY GENERAL AMUSEMENT CORPORATION), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinions of the Tax Court (R. 69-83) are reported in 17 T.C. 1517. The opinion of the Court of Appeals (R. 111-113) is reported in 205 F. 2d 360.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1953. (R. 114.) The petition for a writ of certiorari was filed on August 20, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

The taxpayer, having agreed in writing to serve as the exclusive booking agent for a popular singer, became entitled to receive a commission of 10% on all monies received by the singer under contracts obtained by the taxpayer and on all extensions of such contracts. Apparently, prior to the termination of such contracts, the singer entered into new contracts with another booking agent, MCA Artists, Ltd. Subsequently, the taxpayer and MCA entered into an agreement whereby MCA was to serve as his exclusive booking agent and MCA was to pay the taxpayer a percentage of the commissions received from the singer. The contract also provided that MCA would enter into new contracts with the singer which would supersede the contracts previously entered into between the taxpayer and the singer, and also between MCA and the singer, and cancel all claims and rights thereunder. During the taxable year the taxpayer received about $41,000 under the above-mentioned contract with MCA, about $2,900 of which the taxpayer conceded was ordinary income. The question presented is:

Whether the balance of the sum so received by the taxpayer was ordinary income under Section 22 (a) of the Internal Revenue Code, or capital gain under Section 117.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived

from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Sec. 150 (a)(1), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—As used in this chapter—

* * * * *

(4) *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(10) [As added by Sec. 150 (b), Revenue Act of 1942, *supra*] *Net capital gain.*—

(A) *Corporations.*—In the case of a corporation, the term "net capital gain" means the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges; * * *

* * * * *

(c) [As amended by Sec. 150 (c), Revenue Act of 1942, *supra*] *Alternative Taxes.*—

(1) *Corporations.*—If for any taxable year the net long-term capital gain of any corporation exceeds the net short-term capital loss, there shall be levied, collected, and paid, in lieu of the tax imposed by sections 13, 14, 15, 204, 207(a)(1) or (3), and 500, a tax determined as follows, if and only if such tax is less than the tax imposed by such sections:

A partial tax shall first be computed upon the net income reduced by the amount of such excess, at the rates and in the manner as if this subsection had not been enacted, and the total tax shall be the partial tax plus 25 per centum of such excess.

* * * * *

(26 U.S.C. 117.)

STATEMENT

The facts, as found by the Tax Court (R. 70-77), may be summarized as follows:

The taxpayer, a New York corporation, filed its excess profits tax return for the fiscal year ended October 31, 1944, the taxable year, with the Collector of Internal Revenue in New York. It was engaged in business as a booking agency for performers in the entertainment field, and had agency contracts with about 270 entertainers during the taxable year. (R. 70.) It operated under franchises from various guilds or unions in the motion picture, radio and variety fields. (R. 70-71.)

On July 21, 1942, it entered into a contract with Frank Sinatra whereby it became his exclusive agent in the variety field for a term of one year commencing September 4, 1942, which period was extended for another year until September 4, 1944. Under this contract Sinatra agreed to pay the taxpayer a sum equal to 10% of all monies received by him under contracts of employment entered into during the term of the agreement or in existence when the contract was entered into on which commissions were not payable to any other agent. The taxpayer was entitled to the 10% after the expiration of the contract as long as the singer continued to receive payments under employment contracts entered into by him during the term of the contract or during extensions pursuant to options on such contracts regardless of when the options were exercised. If the singer terminated a contract of employment, except on account of illness or for a similar cause, during the period the taxpayer was entitled to commissions, and entered into a new contract with the same employer within sixty days, the new contract was to be deemed in substitution of the terminated one. (R. 70-71.)

On July 21, 1942, the taxpayer and Sinatra entered into a similar contract whereby it became his exclusive agent in the broadcasting industry for a 10% commission. It also was for a term of one year from September 4, 1942, and was extended for one additional year or until September 4, 1944. (R. 72.)

On April 26, 1943, the taxpayer entered into a similar contract with Sinatra whereby it became

his exclusive agent in the motion picture industry for a term of one year from that date for a 10% commission. (R. 72.)

It would appear that subsequently Sinatra entered into three contracts with MCA Artists, Ltd., hereinafter called MCA, dated August 26, 1943, which was prior to the termination of the three above-mentioned contracts with the taxpayer. Later the taxpayer and MCA entered into an agreement dated December 10, 1943, which provided that the taxpayer "sells" to MCA the three agency contracts between the taxpayer and Sinatra; that MCA would serve as Sinatra's booking agent and that MCA would pay the taxpayer a percentage of the compensation due from Sinatra; and also that MCA would enter into a new contract with Sinatra for the period beginning December 1, 1943, which would supersede the three contracts between the taxpayer and Sinatra and the contracts dated August 26, 1943, between MCA and Sinatra, and cancel all claims and rights thereunder. (R. 73-74.) Sinatra endorsed the contract between the taxpayer and MCA and agreed to be bound by it. (R. 74.) MCA and Sinatra entered into three contracts dated January 21, 1944, providing that the former was his exclusive agent in the radio, motion picture and variety fields for the period December 1, 1943, to November 30, 1948. (R. 74-75.)

Under the contract between the taxpayer and MCA, the taxpayer received during the taxable year $41,780.88, which it reported on its excess profits tax return as gain from the sale or exchange

of capital assets. (R. 70.) The Commissioner determined a deficiency in excess profits tax in the amount of $20,573.80 on the ground that the above-mentioned sum of $41,780.88 represented ordinary income. (R. 8, 12, 70.) At the hearing in the Tax Court the taxpayer conceded that $2,920.35 of the total of $41,780.88 received by the taxpayer represented ordinary income. (R. 75.) The Tax Court decided, with five Judges dissenting, that the balance of the sum received by the taxpayer, or $38,-860.53, was ordinary income. (R. 77-83.) The court below affirmed the decision of the Tax Court. (R. 111-113.)

ARGUMENT

The decision of the court below is correct and there is no direct conflict of decisions. Section 22 (a) of the Internal Revenue Code, *supra*, p. 2, provides in part that "gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades or businesses. It is clear that the sum of $38,860.53 (R. 75) which the taxpayer received during the taxable year from MCA represented compensation for services or was otherwise within the broad definition of ordinary income. But the taxpayer contends that it is entitled to the benefits of subdivision (c) of Section 117 of the Internal Revenue Code, *supra*, p. 4, because the sum represents capital gain within the meaning of subdivision (a)(4) and (10) of Section 117, *supra*, p. 3. The substance of its argu-

ment is that the three booking agency contracts which it had previously entered into with Sinatra were capital assets, that it "sold" those assets to MCA, and therefore the resulting gain is a capital gain.

The taxpayer's argument overlooks the fact that some of the sum of $38,860.53 (R. 75) was compensation for services rendered either in the taxable year or previously, and therefore was ordinary income to the taxpayer regardless of any assignment or transfer. *Lucas* v. *Earl*, 281 U. S. 111; *Helvering* v. *Eubank*, 311 U.S. 122; *Commissioner* v. *Culbertson*, 337 U.S. 733, 739-740. The dissenting opinion of the Tax Court in this case apparently overlooks this aspect of the case. (R. 82.) The court below decided that at least $15,469 represented compensation for past services performed by the taxpayer (R. 112), and the correctness of that analysis of the undisputed findings of fact is not here questioned, nor is it alleged that there is any conflict of decisions on that issue. Therefore there is no reason for this Court to review that part of the decision of the court below.

As to that part of the sum of $38,860.53 which was not produced by the taxpayer's personal services, the decisive question under Section 117(a)(4) and (10) is whether there was a sale or exchange of the contracts from the taxpayer to MCA. The contracts related to the performance of personal services by the taxpayer in behalf of Sinatra, and in the absence of an express provision therein permitting the transfer of such right to another to

render services for Sinatra, the taxpayer was precluded from "selling" the contracts unless, of course, it obtained the consent of Sinatra. The taxpayer might have transferred its right to receive compensation for past services to another but, as shown by the discussion in the preceding paragraph, that would not relieve the taxpayer from paying federal income taxes on such compensation.

In regard to services to be performed after the assignment or transfer with the consent of Sinatra, although the record is not too clear in this respect as the Tax Court observed (R. 78-79), it appears that prior to the agreement dated December 10, 1943, between the taxpayer and MCA whereby the taxpayer purported to "sell" its contracts, Sinatra entered into three contracts with MCA dated August 26, 1943 (R. 73). The agreement of December 10, 1943, provided that MCA undertook to obtain new contracts with Sinatra for the period beginning December 1, 1943, which would supersede, cancel and take the place of the three contracts between the taxpayer and Sinatra, as well as the contracts between MCA and Sinatra dated August 26, 1943, and also all claims, demands, actions and rights thereunder. In consideration of the terms MCA agreed to pay the taxpayer a certain percentage of the commissions. (R. 73.) This transaction was clearly not a sale of the taxpayer's contracts, as the court below pointed out (R. 113), because the parties contemplated that MCA should negotiate the new contracts which would supersede those entered into between the taxpayer and

Sinatra, and also those entered into between MCA and Sinatra.

While there are no decisions precisely in point, there are several in analogous cases which support the decision of the court below. See *Commissioner* v. *Starr Bros.*, 204 F. 2d 673 (C.A. 2d), where the taxpayer received a sum of money from a manufacturer for agreeing to terminate a contract under which the taxpayer had been granted the exclusive right to sell the manufacturer's products in a certain city, and the court held that there was no sale or exchange under the capital gains provision; *Bingham* v. *Commissioner,* 105 F. 2d 971 (C. A. 2d), where the holder of a note surrendered it to the maker on receiving payment and claimed the benefit of the capital gains provision on the theory that he made a sale of the note, but the court held otherwise; *Hale* v. *Helvering,* 85 F. 2d 819 (C.A. D.C.), to the same effect; *Fairbanks* v. *United States,* 306 U.S. 436, where this Court held that the redemption of a bond was not a sale within the meaning of the capital gains provision; *Helvering* v. *Flaccus Leather Co.,* 313 U.S. 247, where this Court held that the receipt of proceeds of fire insurance policies after a loss could not qualify as a capital gain; *Beals' Estate* v. *Commissioner,* 82 F. 2d 268 (C.A. 2d), where it was held that a sum received by the taxpayer for a covenant not to engage in competitive business was ordinary income and not gain realized on disposal of a capital asset; *Cox* v. *Helvering,* 71 F. 2d 987 (C.A.D.C.), to the same effect. Compare *Hort* v. *Commissioner,* 313

U.S. 28, and decision of the Tax Court in that case, 39 B.T.A. 922, 926.

While there is some basis for the assertion that the two cases cited by the taxpayer, *Jones* v. *Corbyn,* 186 F. 2d 450 (C.A. 10th), and *Commissioner* v. *Golonsky,* 200 F. 2d 72 (C.A. 3d), certiorari denied, 345 U.S. 939 (Pet. 6-11), conflict in principle with the decision of the court below, the facts involved in those cases are substantially different. In *Jones* v. *Corbyn, supra,* an insurance agent brought suit against the insurance company for breach of an exclusive agency contract and while the suit was pending the insurance company paid the agent a lump sum in settlement of the litigation. The majority of the court held that the sum received by the agent represented capital gain on the ground that the latter had made a sale of a going business. There the agent agreed to turn over to the company its office space and all books, records and files pertaining to the company business, and the undisputed evidence showed that the value of the contract and business was not less than $45,000. In the present case, however, there is no factual basis to support a finding that the taxpayer made a sale of a going business, and there was no evidence as to the value of the contracts. The taxpayer continued to represent about 270 entertainers exclusive of Sinatra (R. 70), and there is no evidence to show that it turned over its office space, books, records and files to MCA.

In *Commissioner* v. *Golonsky, supra,* a sum of money was paid to the lessee by the owner of the

property for accelerated termination of the lease and the court held that it was capital gain. (For a case to the contrary, see *United Cigar-Whelan Stores Corp.* v. *District of Columbia,* 176 F. 2d 952 (C.A.D.C.).) That case differs from the present case because it involves the transfer of a lease, whereas the present case involves the transfer of contracts to render personal services. Moreover, although the transfer in this case was to a third party (Pet. 11), the assignment was meaningless without the consent of Sinatra because MCA wanted to be his exclusive agent. Therefore it was necessary under the contract between the taxpayer and MCA, as the court below pointed out (R. 113), for the former to release Sinatra from his negative covenant not to employ any other agent than the taxpayer in order to carry out the agreement of December 10, 1943.

The taxpayer argues that such a transaction as we have here is a sale without the necessity of specific legislative enactment. (Pet. 11.) In an analogous case, *Helvering* v. *Flaccus Leather Co.*, 313 U.S. 247, 251, this Court thought otherwise.

If this Court should grant a writ in this case, we submit that it should exclude not only that portion of the income which represented compensation for past services, but also the issue with respect to relief under Section 722 of the Internal Revenue Code, because no conflict exists or is alleged on those issues.

CONCLUSION

The decision of the court below is correct and there is no direct conflict of decisions. The case

primarily depends upon its particular facts and for that reason is not of general importance. Therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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